

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

DIALLO R. MADISON,

Plaintiff,

v.

9:06-CV-1488
(NAM)(DEP)

F. NESMITH, RPA, DR. SILVERBERG,
and GEORGE S. DUNCAN,

Defendants.

APPEARANCES:

DIALLO R. MADISON
Plaintiff, *pro se*

DAVID E. PEEBLES, U.S. MAGISTRATE JUDGE

DECISION and ORDER

A. Background

The Clerk has sent to the Court a civil rights complaint filed by plaintiff Diallo R. Madison. Dkt. No. 66. The plaintiff is currently incarcerated at Woodbourne Correctional Facility. This action was transferred to this District from the Western District of New York. Dkt. No. 81.

This action originated in the Southern District of New York by the filing of the plaintiff's original complaint. Dkt. No. 1. After being ordered to file an amended complaint, the plaintiff submitted an amended pleading in the Southern District of New York.¹ Dkt. No. 7. The plaintiff's claims against defendants Alves and Dyal, who reside in Chemung

¹ The amended complaint contained allegations of wrongdoing against Lester Wright, William Mazzuca, D.J. Schramm, David Miller, Mikahil Guzman, Thomas Rick, Riley, Michael McGinnis, J. Alves, and K. Dyal.

County, were transferred to the Western District of New York. *Id.*

After the action was transferred to the Western District, the defendants Alves and Dyal filed Answers to the plaintiff's amended complaint on March 16, 2005 and March 24, 2005. Dkt. Nos. 49, 50. The plaintiff then filed three motions to amend his amended complaint, attempting to name F. Nesmith, Dr. Silverberg, and George S. Duncan as defendants. Dkt. Nos. 58, 61, 65. The plaintiff also submitted a proposed amended complaint. Dkt. No. 66.

By the Order of United States District Judge Charles J. Siragusa, the plaintiff's motions to amend were denied because venue was improper.² The plaintiff's "proposed Eighth Amendment claims against Nesmith, Silverberg, and Duncan were transferred to the United States District Court for the Northern District of New York." Dkt. No. 81 at 5.

B. Allegations in the Complaint

The plaintiff's proposed amended complaint has been sent to this Court for review. Dkt. No. 66. Only the plaintiff's Eighth Amendment claims against defendants Nesmith, Silverberg, and Duncan will be addressed.³

In his complaint, the plaintiff alleges that defendant Nesmith, a Registered Physician's Assistant, performed an unauthorized, unsupervised surgical procedure on the plaintiff's right elbow, which the plaintiff claims was "botched," causing him continued pain

² Defendants Nesmith, Silverberg and Duncan are employed at Great Meadow Correctional Facility, which is located in the Northern District of New York. Great Meadow Correctional Facility is also the location of the events giving rise to the plaintiff's proposed amended claims.

³ Plaintiff's proposed amended complaint also contains allegations of wrongdoing against Alves and Dyal. These claims are still pending before the Southern District of New York.

and loss of range of movement. *Id.* at ¶¶ 63-64. The plaintiff claims that Nesmith's supervisor, defendant Silverberg, wrongfully allowed Nesmith to perform the unauthorized surgery. *Id.* at ¶¶ 67-68. The plaintiff also claims that defendant Duncan created a "policy and custom" whereby a physician's assistant was allowed to perform an unauthorized surgery. *Id.* at 70. For a more complete statement of the plaintiff's claims, reference is made to the complaint.

WHEREFORE, it is hereby

ORDERED, that the Clerk shall issue summonses naming the three current defendants and forward them, along with copies of the amended complaint, to the United States Marshal for service upon the named defendants, together with a copy of this Order.⁴ The Clerk shall also forward a copy of the summons and amended complaint by mail to the Office of the Attorney General for the State of New York, together with a copy of this Order, and it is further

ORDERED, that a formal response to the plaintiff's amended complaint be filed by the defendants or their counsel as provided for in Rule 12 of the Federal Rules of Civil Procedure subsequent to service of process on the defendants, and it is further

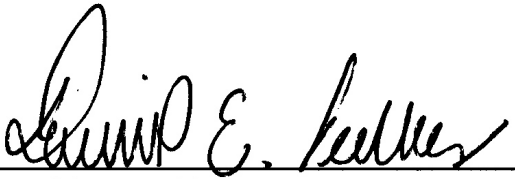
ORDERED, that all pleadings, motions and other documents relating to this action must bear the case number assigned to this action and be filed with the Clerk of the United States District Court, Northern District of New York, 7th Floor, Federal Building, 100 S. Clinton St., Syracuse, New York 13261-7367. **Any paper sent by a party to the Court**

⁴ The plaintiff was granted leave to proceed with this action *in forma pauperis* by Order of Chief Judge Michael B. Mukasey of the Southern District of New York. Dkt. No. 4.

or the Clerk must be accompanied by a certificate showing that a true and correct copy of it was mailed to all opposing parties or their counsel. Any document received by the Clerk or the Court which does not include a proper certificate of service will be returned, without processing. The plaintiff must comply with requests by the Clerk's Office for any documents that are necessary to maintain this action. All parties must comply with Local Rule 7.1 of the Northern District of New York in filing motions, which must be returnable before the assigned Magistrate Judge with proper allowance for notice as required by the Rules. The plaintiff is also required to promptly notify the Clerk's Office and all parties or their counsel of any change in his address; his failure to do so will result in the dismissal of this action. All motions will be decided on submitted papers without oral argument unless otherwise ordered by the Court; and it is further

ORDERED, that the Clerk serve a copy of this Order on the plaintiff by regular mail.
IT IS SO ORDERED.

Dated: February 1, 2007
Syracuse, NY



David E. Peebles
U.S. Magistrate Judge